BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CARLOS MARTINEZ JR.	)	
Claimant	)	
	)	
VS.	)	
	)	
H.D. DRILLING, LLC.	)	
Respondent	)	Docket No. **1,046,462**
	)	
AND	)	
	)	
GRANITE STATE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the December 16, 2010 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on March 23, 2011.

APPEARANCES

Brian D. Pistotnik of Wichita, Kansas, appeared for the claimants. John D. Jurcyk of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in each Award.

ISSUES

Claimant was a passenger in an automobile with four co-workers who worked on oil rigs for respondent. On June 21, 2009, as the four were traveling home from work the automobile left the roadway and wrecked. Claimant suffered injuries in the accident. The parties agreed that claimant suffered a 20 percent whole body functional impairment due to injuries suffered in the accident. Claimant also sought compensation for a work disability.

But respondent denied the accident arose out of and in the course of employment because K.S.A. 2008 Supp. 44-508(f) prohibits compensation for workers injured going to or coming from work. In the alternative, respondent argued claimant should be estopped from asserting a claim because he accepted a third party settlement against the co-worker

driver's insurance carrier. Respondent further argues that the exclusive remedy provision of the workers compensation act bars actions against co-workers hurt on the job, thus claimant has taken an inconsistent position in each claim. Claimant argued that travel was an inherent part of the claimant's job and consequently K.S.A. 2008 Supp. 44-508(f) is inapplicable. Claimant further argued that there is simply no evidence provided to support respondent's estoppel argument.

The Administrative Law Judge (ALJ) determined that travel was an integral part of claimant's job and found the accidental injury arose out of and in the course of employment. The ALJ further determined that as a result of the accidental injury claimant had suffered a 91 percent work disability. The ALJ found that although there was some indication that claimant received some settlement from the insurer of the vehicle involved in the accident, no further evidence was provided other than argument of counsel and consequently respondent failed to meet its burden to prove the equitable remedy of estoppel was applicable.

Respondent requests review of the following: (1) whether claimant's accidental injury arose out of and in the course of employment with respondent; and, (2) whether claimant is estopped from receiving worker's compensation benefits due to receiving a third-party tort settlement with the insurer of the vehicle involved in the accident.

Claimant argues that travel was an integral part of claimant's employment and the ALJ's finding should be affirmed. Claimant further argues that equitable estoppel doesn't apply in this case.

The issues for Board determination include whether the claim is prohibited by K.S.A. 2008 Supp. 44-508(f) and, if not, whether claimant should be estopped from pursuing his workers compensation claim.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

Briefly stated, Claimant dropped out of school midway through his ninth grade year and he is currently attending school at New Mexico Junior College to get his GED and then a degree. Claimant is a legal citizen of the United States. He worked as a "motor man" for respondent's drilling rig. Carlos Martinez was working full-time and he earned $14 an

hour plus overtime. He also received a daily per diem. Claimant's father (Carlos Martinez Sr.) and brother (Ricardo Martinez) also worked for the respondent.

Claimant testified the respondent's oil rig would be in one place for 15-20 days and that his brother (Ricardo Martinez) was the "driller" in charge. The same crew worked together even though they would move to a different location. Claimant testified that he would ride with his brother back and forth to work. Claimant testified that the crew would travel to the different oil well sites. He testified:

> Q. Okay. And, of course, by driving with your crew to all these different locations around the state, would that benefit your employer?
>
> A. Yes, it would.
>
> MR. JURCYK: Objection. Calls for speculation. Lack of foundation.
>
> Q. I'm sorry. I didn't hear your answer.
>
> A. Yes, it would.
>
> Q. How would it benefit your employer?
>
> A. Well, because he didn't have to -- you know, he always had the group and he always had people on time and knew what they had to do instead of opposed to getting new people every time they moved locations.[1]

After a full day of work on June 21, 2009, Ricardo Martinez, Carlos Quintana, Arturo Martinez, and claimant were in the same car heading home on the most direct route. Ricardo Martinez was driving and the other three were occupants in the same vehicle. Claimant immediately fell asleep. Apparently, Ricardo Martinez fell asleep at the wheel, veered left of center, crossed the lane and went into a ditch. The vehicle traveled a short distance and then hit a field entrance which vaulted the vehicle in the air and it rolled another time when it came to rest on its top in a field.

Claimant suffered a spinal break at T4, reduced two vertebrae to 30 percent, broke two more and disintegrated two others as well. He was hospitalized at Wesley Medical Center from June 21, 2009 through June 29, 2009. He suffered a head injury and multiple fractures to his spine in the accident and he doesn't remember anything except waking up at the hospital, a week later. A three level spinal fusion was performed. Claimant also suffered a pulmonary contusion on both sides and a pneumothorax. A back brace was provided and he also had to use a walker. Physical therapy began on July 8, 2009, at Western Plains Hospital in Dodge City, Kansas.

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[1] Carlos Martinez Jr. Depo. at 13-14.

After being released from the hospital on June 29, 2009, claimant had a follow-up appointment with Dr. Matthew Henry at Abay Neuroscience. On September 24, 2009, another surgery occurred due to the lack of a fusion. A back brace and physical therapy continued for approximately a month.

Claimant attempted to return to work for respondent but was only able to work a couple of days. Claimant told respondent that he was physically not able to perform the work so respondent tried to temporarily accommodate claimant with some light-duty work. Claimant testified that he decided to go back to school since he wasn't able to do his regular work. Claimant did work as a cashier in August 2010. It was a full-time job and it paid $9 an hour or $360 a week. But claimant testified that his back was hurting real bad due to standing all day so he quit.

CONCLUSIONS OF LAW

Initially, respondent argues that pursuant to K.S.A. 2008 Supp. 44-508(f), claimant did not suffer accidental injury arising out of and in the course of employment because he was injured traveling home after he had left the work site for the day.

The "going and coming" rule contained in K.S.A. 2008 Supp. 44-508(f) provides in pertinent part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

K.S.A. 2008 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[2] In *Thompson*,[3] the Kansas Supreme Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which

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[2] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

[3] *Thompson* v. *Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

> the general public is subjected. Thus, those risks are not causally related to the employment.

But K.S.A. 2008 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[4] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[5]

In this case the accident did not occur on the respondent's premises. Nor was the claimant injured while using the only route available to or from work involving a special risk or hazard. Consequently, the statutory exceptions contained in K.S.A. 2008 Supp. 44-508(f) are not applicable to this fact situation. But the analysis does not end with that determination.

The Kansas appellate courts have also noted that the "going and coming" rule, does not apply when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[6] It is this principle that is at the heart of this claim.

In *Messenger* the Kansas Court of Appeals determined that the "going and coming" rule is not applicable where travel on public roadways is an integral or necessary part of the employment.[7] In *Messenger*, the claimant was killed in a truck accident "on the way home from a distant drill site" and the court was asked to decide whether claimant's claim was compensable or barred by the going and coming rule. The *Messenger* Court noted that it was customary in the oilfield industry for the employer to pay the driller to drive and to transport his crew.[8] The employer also provided the employee with a company vehicle which he was allowed to take home and drive to the work site each day, thus furthering the employer's interests.[9] It was also important that the employee had no fixed work site.[10]

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[4] *Id*. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area controlled by the employer. See also, *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

[5] *Id*. at 40.

[6] *Halford v. Nowak Const. Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ___Kan. ___(2008); *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

[7] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[8] *Id.* at 440.

[9] *Id.* at 439.

[10] *Id.*

In holding that the "going and coming" rule did not apply, the Court of Appeals stressed the benefit that the employer derived from the travel arrangement.

> Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.[11]

In *Kindel*,[12] the Kansas Supreme Court approved the *Messenger* decision and stated:

> Although K.S.A. 1991 Supp. 44-508(f), a codification of the longstanding "going and coming" rule, provides that injuries occurring while traveling to and from employment are generally not compensable, there is an exception which applies when travel upon the public roadways is an integral or necessary part of the employment. (Citations omitted.) Because Kindel and other Ferco employees were expected to live out of town during the work weeks, and transportation to and from the remote site was in a company vehicle driven by a supervisor, this case falls within the exception to the general rule.[13]

In *Kindel*, the claimant was "expected to live out of town during the work weeks, and transportation to and from the remote site was in a company vehicle driven by a supervisor."[14] But on the day in question, the claimant and his supervisor were on their way home when they stopped at a local club where they became inebriated. After leaving the club, the two were involved in an automobile accident. The *Kindel* Court was asked whether an employee's personal or non-business-related activity would be considered a deviation from the employer's work. Absent the deviation to the club, the claimant's trip home with his supervisor was considered compensable under the travel exception.

In a more recent decision, the Kansas Court of Appeals in *Brobst*[15] reiterated that accidents occurring while going and coming from work are compensable where travel is either (a) intrinsic to the job or (b) required to complete some special work-related errand or trip. The Court of Appeals stated:

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[11] *Messenger* at 437.

[12] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[13] *Kindel* at 277.

[14] *Kindel* at 277.

[15] *Brobst v. Brighton Place North,* 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

> . . . Kansas case law recognizes a distinction between accidents incurred during the normal going and coming from a regular permanent work location and accidents incurred during going and coming in an employment in which the going and coming is an incident of the employment itself.
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> Under this third qualification to the going and coming rule, injuries incurred while going and coming from places where work-related tasks occur can be compensable where the traveling is (a) intrinsic to the profession or (b) required in order to complete some special work-related errand or special-purpose trip in the scope of the employment. This third exception has been noted in several Kansas cases, many of which post-date the 1968 premises and special hazard amendments to the Workers Compensation Act.[16] (Citations omitted.)

Taken together, these cases illustrate the principle advanced by the claimant.

The ALJ analyzed the evidence in the following fashion:

> K.S.A. 44-508(f) is the controlling statute to determine whether injuries arose out of and in the course of employment. Generally an employee is not compensated for injuries that occur while the employee is on the way to assume duties of employment or after leaving such duties. There are exceptions to this rule contained in the rule and an additional exception created by case law. In Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556 rev. den. 235 Kan. 1042 (1984), the court found that an exception to the 'coming and going rule' would apply when the operation of a motor vehicle on the public roadways was an integral part of the employment or was inherent in the nature of the employment or was necessary to the employment, so that the travels were furthering the interest of the employer. The *Messenger* case involved the oil industry and a drilling crew. It distinguished drilling work from regular employment since there was not permanent work location and the employer sought persons who were willing to work at mobile sites. It also found a mutual benefit with the transportation arrangement.
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> The claimant was required to travel to different job sites. The rig was usually moved every couple of weeks. The respondent did not try to find worker closer to each location as they had a crew that was reliable and knew their job. The claimant was expected to travel with the driller as that was customary and he did receive a daily per diem. Both the claimant and respondent received benefit from the travel arrangement. Travel was an integral part of the job. It is found that an exception exists and that the claimant's injuries arose out of an in the course of his employment.

The parties stipulated that he [the claimant] suffers a 10% permanent partial disability to the body as a whole.[17]

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[16] *Brobst* at 773-774.

[17] ALJ Award (Dec. 16, 2010) at 6.

In this case the claimant was traveling because it was a requirement of his employment. Claimant was required to travel to the oil rigs where he customarily worked and he also received a daily per diem amount. Travel was an integral part of claimant's job. The injury arose out of and in the course of his employment with respondent. Therefore, the accident is compensable under the Workers Compensation Act.

Respondent also argues that as a consequence of the recent *Bergstrom*,[18] decision the only exceptions to the "going and coming" rule are the two specific exceptions enumerated in K.S.A. 2008 Supp. 44-508(f). In *Bergstrom*,[19] the Kansas Supreme Court recently held:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.

The court further held:

> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.[20]

Respondent further argues that the inherent travel and special purpose exceptions to the "going and coming" rule are judicially created exceptions and, applying the strict literal construction rule of *Bergstrom*, should no longer be precedential.

The Board disagrees. The integral travel and special purpose findings in the reported judicial cases were simply judicial determinations that the "going and coming" rule was not applicable because the workers in those cases were already in the course of employment when the accidents occurred. Stated another way, the workers were not on the way to work because the travel itself was a part of the job. This distinction was accurately noted in the concurring opinion in *Halford* [21] where it was stated in pertinent part:

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[18] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, Syl. ¶ 1, 214 P.3d 676 (2009).

[19] *Id*.

[20] *Id.*, Syl. ¶ 2.

[21] *Halford v. Nowak Const. Co.,* 39 Kan. App. 2d 935, 942, 186 P.3d 206, *rev. denied* ___ Kan. ___ (2008).

> I merely wish to add that the exception to the going-and-coming rule for travel that is intrinsic to the job is firmly rooted in the statutory language, even though many cases have referred to it as a judicially created exception. The statute provides that a worker is not covered "while the employee is on the way to assume the duties of employment." K.S.A. 4-508(f). Where travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day's work. Thus, the employee is no longer "on the way to assume the duties of employment"-he or she has already begun the essential tasks of the job. Such an employee is covered by the Workers Compensation Act and is not excluded from coverage by the going-and-coming rule.

Moreover, the *Bergstrom* case neither construed K.S.A. 2008 Supp. 44-508(f) nor overruled any cases that have interpreted that statute and is factually distinguishable. Accordingly, the Board finds claimant's accident and injury arose out of and in the course of his employment with respondent and is not barred by the going and coming rule.

Respondent next argues claimant should be estopped from making a workers compensation claim because he received an amount in settlement of a negligence claim against the driver of the car, his co-worker. Respondent further argues that the exclusive remedy would be a bar against a co-worker and thus, claimant has taken an inconsistent position in each claim.

Kansas has applied the doctrine of equitable estoppel in workers' compensation proceedings.[22] In *Marley*, the Kansas Court of Appeals held a claimant to the terms of his written agreement with respondent by finding claimant was estopped from denying he was an independent contractor.

> The doctrine of equitable estoppel requires consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction wholly inconsistent with his or her previous acts and business connections with such transaction.[23]

However, "one who asserts an estoppel must show some change in position in reliance on the adversary's misleading statement. . . ."[24]

> A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon

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[22] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421 (2000).

[23] *Marley* at Syl. ¶ 1.

[24] *In re Morgan*, 219 Kan. 136, 546 P.2d 1394 (1976).

> such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts . . . .[25]

Here, there is no evidence that the respondent relied upon claimant's alleged inconsistent positions. To the contrary, there are comments from counsel that indicate the workers compensation carrier was aware of the negligence action and also benefitted from the alleged settlement. Moreover, there is no evidence to establish the nature of the alleged settlement nor to establish the position claimant may have taken or alleged in any such action. Based upon this evidentiary record, the Board finds that respondent has failed to establish that equitable estoppel applies to this claim.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated December 16, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

[25] *United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 527, 561 P.2d 792 (1977).